No. 20458

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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NIC PETER GAGLIARDO,

Appellant,

vs.

ED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

APPELLANT'S REPLY BRIEF

HARRY E. CLAIBORNE
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Las Vegas, Nevada

ATTORNEY FOR APPELLANT

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TABLE OF AUTHORITIES

ARGUMENT

POINT ONE

ITLE 18, SECTION 1464, UNITED STATES CODE, VIOLATES THE ENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES S AN ATTEMPT TO EXERCISE POLICE POWER NOT BELONGING TO IE CONGRESS BUT RESERVED TO THE STATES.

The Government makes a two-pronged attempt to support the constitutionality of the provision of the Federal riminal Code under which appellant was indicted, 18 U.S.C. ec. 1464, providing:

> "Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

In its first tack, the Government contends that the ecord of this case contains evidence that the radio transssion "travelled beyond the boundaries of the State of Nevada" and was capable at least of being received in other States. The Government concedes there is no evidence that te transmission was heard in any State other than Nevada. (nswer Brief p.10). In the second place, the Government aserts that if it be assumed for the sake of argument that te radio communication involved in this case was purely intrastate in character, this intrastate communication is properly the subject for an exercise of federal police power

because:

(a) The Communications Act has pre-empted the field as to all radio communication, regardless of the presence or absence of interstate character;

(b) A line of federal cases dealing with the suppression of evidence obtained by illegal interception of communications and prosecutions based upon such illegal interceptions; and

(c) A further line of federal cases dealing with licensure of radio broadcasters.

There is hereafter set forth the testimony cited by the Government in support of its contention that the radio transmissions involved in this case were of an interstate character or were, at least, capable of being received outside the State of Nevada.

The witness Weldon Empey testified regarding his mobile unit:

"Q How far will your unit reach?

A Well, under the right conditions, possibly direct line of sight would be approximately about sixty or seventy miles.

Q Sixty or seventy miles?

A Yes, sir.

Q Your set will reach that far?

A Yes, sir.

Q What wattage is it?

A It is three and a half watts output. It is legal.

"Q Three and a half watts?

A Yes, sir.

Q Can you communicate accurately that far?

A Not that far, no, sir.

Q In other words, rather accidently, under perfect conditions, I mean, you might be able to hear someone?

A Under perfect conditions and locations, height makes a difference, if you are talking mobile. I say mobile because at that distance there is no ground stations and it would all be mobile.

Q Three and a half watt system is used to talk to people carrying on a conversation?

A Yes, sir.

Q Within the same city?

A Yes, sir. Actually, the legal ground wave is a hundred fifty miles and that is considered, if you would like me to elaborate, that is two hundred and ten thousand foot beats.

Q You would need special equipment?

A No, sir. If you was on correct locations, it is possible to transmit and receive that far under ideal conditions.

Q Not under normal conditions?

A Not under normal, no.

Q Under normal conditions, it is used to communicate just in the vicinity?

A Yes, sir.

"Q Say the City of Las Vegas and Henderson?

A Yes.

MR. CLAIBORNE: That's all." (T. 28 & 29).

The witness Francis L. Fuson testified as follows:

"Q Mr. Fuson, you have testified that the normal range of one of these transmitters three and a half watts, is it, or volts?

A The FCC rules specifications makes it five watts input, which averages out to about three and a half watts or less output.

Q You testified that the normal range of one of these units is ten to twenty-five miles; is that correct?

A That is what the manufacturer of the equipment claims for them. There are some spectacular results occasionally, however.

Q Well, then, when you said it was ten to twenty-five miles normally, are you testifying from your knowledge and experience or from what you have read somewhere?

A I am testifying from my knowledge and experience and what the manufacturers claim.

Q Under the ideal conditions, what, if you know, would be the maximum range of one of these units?

A Well, I think--

Q Approximately?

A --what you are thinking of, there is a condition that they call "skip", and this is an atmospheric condition.

"It is caused by sun spots and at times, under good skip conditions, a Citizen's Band operator can talk four thousand or five thousand miles with no trouble at all, but this is a sporadic condition.

Q Under ideal conditions and perhaps not as extreme as what you refer to as "skip", would it be possible to communicate up to eighty or ninety miles?

A It is possible under good conditions. It is being done quite frequently with the use of what they call directional beam antennas and high towers.

Q As to receiving one of these transmissions, Mr. Fuson, if a three and a half watt output transmitter is being used, would the size of the receiver make any difference, or the power in the receiver as to whether or not a communication from one of these transmitters we have been referring to could be picked up?

A Oh, yes, very definitely. The manufacturer of the receiver can design into the thing any sensitivity that he wants and they state the sensitivity in their brochures and there is a vast difference between a good receiver and a cheap receiver.

Q So, that depending on the type of receiver, you might have been able to pick up a transmission further away than somebody with a different receiver?

A That's right." (T. 88-90).

It is the contention of appellant that this evidence, sofar as it reflects a possibility of interstate communication

of the transmission in question, is nothing but speculation and conjecture, and is wholly insufficient to establish federal criminal jurisdiction which, of course, the Government had the burden of establishing beyond any reasonable doubt.

Authorities dealing with the suppression of evidence in federal courts are not persuasive when it comes to determining whether a provision of the Federal Criminal Code is referable to the exercise of any substantive power conferred upon the Federal Government by the Constitution due to the obvious consideration that Congress and the federal courts are amply vested with power to establish and enforce laws, regulations and rules of procedure in the trial of federal criminal cases. See

NARDONE v. UNITED STATES, 302 U.S. 379,
58 S.Ct. 275, 82 L.Ed. 314.

Authorities in this catagory and thus to be distinguished are exemplified by

WEISS v. UNITED STATES, 308 U.S. 321,
60 S.Ct. 269, 84 L.Ed. 298,

and

BENANTI v. UNITED STATES, 355 U.S. 96,
78 S.Ct. 155, 2 L.Ed.2d 126

where convictions respectively for mail fraud and illegal possession and transportation of distilled spirits based on evidence illegally obtained by wire tapping were reversed although the particular intercepted communication used to establish the substantive offense was intrastate in character.

The rational of these decisions is that the intrastate communications were inseparably connected with interstate communications flowing over the same telephone lines and the protection of interstate communications in order to be effective required control over intrastate communications.

In the cases of

UNITED STATES v. SUGDEN, 9th Circuit 1955,
226 F.2d 281, affirmed per curiam 351 U.S. 916,
100 L.Ed. 1449, 76 S.Ct. 709

and

UNITED STATES v. FULLER, N.D.Cal. 1962,
202 F.Supp. 356,

the courts were concerned with radio communication. In the SUGDEN case, intercepted radio communications broadcast by unlicensed operators were not protected against publication, whereas radio communications by licensed operators were protected and divulgence of the first will be allowed and denied as to the second.

In the FULLER case, a prosecution for unauthorized interception of radio communications, a question as to the private character of the communication was held not properly to be decided on a motion to dismiss an Information.

The SUGDEN case is explicitly dealing with a rule of evidence derived by judicial construction from the prohibition against illegal interception of communications.

The FULLER case recognizes that radio communications are specifically protected by Section 605 of the Communications

t except for communications which are public in nature. e decision does not deal with a contention that interption of intrastate communication is valid.

The cases relied upon by the Government as to censure of radio outlets as to predominently intrastate erations are not persuasive either that Congress has the thority to make an exercise of classical police power as intrastate broadcasts because it is apparant that an derly system of allocation and use of wave frequencies verned by a central authority is necessary to the effective gulation of interstate radio communication; but this is not say that the Federal Government, separate and apart from thing contained in the Communications Act, can make an xercise of a police power which both in broad terms and in its plication to this prosecution is unrelated to interstate mmunication or any other area of federal authority. The ad assertion by the Government that 18 U.S.C. 1464 is to be sidered a part of the Communications Act not supported by reference to any authority whatever is in flat contradition of the legislative history detailed in appellant's ning Brief.

Sections 151, 152 and 301 of 47 U.S.C.A. enacted the Communications Act of 1934 specifically recognize the sdiction of the States of intrastate communications. ction 151 declares the purpose of the Act to be to regulate rstate and foreign commerce in communication by wire and o. Section 152 specifically provides that subject to the

provisions of Section 301, the Act is not to be construed to apply to changes, classifications, practices, services, facilities or regulations for or in connection with intrastate communication service by wire or radio. Section 301 dealing with licenses declares the purpose of the legislation to be, among other things, the maintenance of control over interstate and foreign radio transmission. Licensing is authorized for communications within a State only when the effects of such use extend beyond the borders of that State or when interference with interstate or foreign communication is caused by such use or operation.

47 U.S.C.A. Section 326 provides the Communications Act shall not be understood or construed to give the Federal Communications Commission power of censorship over radio communications.

On the basis of the clear declaration of purpose and the clear restriction of the Act to the regulation of interstate and foreign commerce, numerous cases have held that communications taking place within a single State are intrastate in nature and it was the Congressional intent to reserve to the several States the right to regulate such intrastate services rather than to pre-empt the field, as held, for example in,

INDEPENDENT THEATER OWNERS OF ARKANSAS v. ARKANSAS PUBLIC SERVICE COMMISSION, 1962 361 SW2d, 642,

RADIO TELEPHONE COMMUNICATIONS, INC. v. SOUTHEASTERN TEL. CO., Fla. 1964, 170 So.2d 577

id

BELL TEL. CO. v. PUBLIC SERVICE COMMISSION,

70 Nev. 25, 253 P.2d 602.

Coming even closer to the particular matter at

ssue is

STATE v. WESTERN UNION TEL. CO., 12 N.J. 468,

97 A.2d 480

telegraph company which habitually received and transmitted
rough its office bets on horse races through a medium of
elegraphic money orders and messages, and paid at the office
ne winnings on the bets less the cost of the telegrams.
aving knowledge of the nature of the telegraphic messages
as a common law disorderly house subject to indictment and
rosectuion under State law. The claim that such prosecution
laced an undue burden on interstate commerce was rejected by
ne court on the ground that the operation being illegal, it
ould not legitimately be classified as interstate commerce
ven though all the messages passed through Pennsylvania
nder the system of communication in effect. An appeal of this
ase was dismissed by the United States Supreme Court for the
nt of a substantial federal question.

346 U.S. 869, 74 S.Ct. 124

To the same effect, the State may prohibit price
dvertising on eyeglasses in the exercise of State police
ower even though advertising is by radio communication which
xtends beyond the border of a State.

HEAD v. NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,

374 U.S. 424, 83 S.Ct. 1759, 10 L.Ed.2d 983.

The only case in the United States which has dealt irectly with the broadcasting of obscene, indecent or profane anguage by radio communication is

DUNCAN v. UNITED STATES, C.A.9th, 1931,

48 F.2d 128

n a prosecution brought under the provisions of the Radio Act f 1927, in which case the indictment specifically charged the ommunication was by interstate radio transmission. 18 U.S.C. ec. 1464 is not part of the Federal Communications Act. It s part of the general Federal Criminal Code. By its terms, t is not referable to the lawful exercise of any federal ower granted by the Constitution and in its application to this ase it is an unconstitutional assertion of police power eserved to the State of Nevada under the Tenth Amendment of he Constitution of the United States.

In

HEAD v. NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY,

supra.

he Government's argument in this case as to pre-emption of the ield and federal criminal jurisdiction over intrastate conduct s thoroughly blasted in the following language:

> "In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the 'comprehensive' nature of federal regulation under the Federal Communications Act.

regulations concerning the subject of advertising for the guidance of broadcasters. (Citing cases.) This grant of federal power, it is argued, is sufficient to oust state regulations of radio advertising.

"Assuming this to be a correct statement of the Commission's authority, we are nevertheless not persuaded that the federal legislation in this field has excluded the application of a state law of the kind here involved. The nature of the regulatory power given to the federal agency convinces us that Congress could not have intended its grant of authorit to supplant all the detailed state regulation of professional advertising practices, particularly when the grant of power to the Commission was accompanied by no substantive standard other than the 'public interest, convenience, and necessity.' The Solicitor General has conceded that the power of license revocation is not a plausible substitute for state law dealing with 'traditional' torts or crimes committed through the use of radio. We can find no material difference with respect to the less 'traditional' statutory violation here involved. In the absence of positive evidence of legislative intent to the contrary, we cannot believe Congress has ousted the States from an area of such fundamentally local concern."

POINT TWO

THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON APPELLANT'S THEORY OF THE CASE AND REFUSED TO CHARGE THE JURY AS TO THE CORRECT TEST AS TO WHAT CONSTITUTES THE USE OF OBSCENE AND INDECENT LANGUAGE WITHIN THE MEANING OF THE LAW.

The rather extended dissertation by the Government in Point Two of its Answer Brief is not responsive to the challenge made by the appellant to the inadequacy of the instruction given by the court on the meaning of obscene or indecent language under 18 U.S.C. 1464. Appellant's position is that the meaning of obscene and indecent words is to be determined from two perspectives by the jury. The first perspective is whether or not the language used is calculated to excite animal or corrupt passion, and the second is whether it may, in fact, fairly be said to have that affect upon the minds of the hearers. In

DUNCAN v. UNITED STATES, CA 9th 1931,
48 F.2d 128

the instruction given by the court defining an obscene word as being proscribed as to the average person applying contemporary community standards the word or words have to do with the prurient, the lewd or the lascivious. Obviously, words may "have to do" with the prurient, lewd or the lascivious without being calculated to arouse a libidinous or corrupt thought in the mind of the hearer. The case of

MISHKIN v. STATE OF NEW YORK, 3/21/66,

86 S.Ct. 958

deals with the scienter in the publication of allegedly obscene booklets. It is there pointed out that the Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherited in the definition of obscenity. In this regard, it is calculated purveyance of obscene and indecent literature or language which is to be struck down by the penal law and no other. See also

GINZBURG v. UNITED STATES, 3/21/66

86 S.Ct. 942

holding, among other things, that the question of obsenity may include the consideration of the setting or surrounding circumstances in which the alleged publication of obscene materials took place. The court's instruction wholly failed to direct the attention of the jury to the issue of scienter and to the particular effect for the language must sufficien to bring about in the minds of the hearers.

Additionally, the court gave no instruction on what constituted indecent language and as heretofore pointed out, in appellant's brief in chief, the uncertainty of the jury on this point is reflected by their request for a dictionary and, therefore, the puzzlement is expressed in the message inquired whether or not they were to determine with what intention the language was used in the broadcast.

The authorities set forth by the Government on this point support the contention of the appellant.

POINT THREE

APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE OF PREJUDICIAL COMMUNICATIONS AND INSTRUCTIONS MADE PRIVATELY TO THE JURY BY THE TRIAL JUDGE.

The Government, in response to the charge of error ade under this point admits that it was error for the trial ourt to communicate with the jury in the absence of the efendant and his attorney but contends that the appellant as not prejudiced thereby. The authorities relied upon by he Government are divisible by circuits into those jurisdic-ions in which the appellant is protected in his right to be resent at every proceeding in the trial and holding that any uch private communication is error, reversible error, without ny inquiry as to prejudice and those circuits where prejudice s presumed in the absence of an affirmative showing by the overnment that prejudice did not result. The latter holding s reflected by decisions of this Honorable Court in

AH FOOK CHANG v. UNITED STATES, 1937
91 F.2d 805

iscussed in the Opening Brief. On this appeal, nothing hatever has been presented by the Government by way of making n affirmative showing that prejudice did not result to the ppellant. At the conclusion of the point, the Government orthrightly declares: "It would be presumptuous to attempt o persuade this court that the record herein affirmatively hows that the appellant was not prejudiced". The Government

further concedes that this case properly falls under the rule of

AH FOOK CHANG, supra

in which prejudice is presumed. The appellant's conviction must be reversed.

POINT FOUR

THE EVIDENCE ESTABLISHED, AS A MATTER OF LAW, THAT THE APPELLANT WAS NOT GUILTY OF THE CRIME CHARGED, AND HE IS ENTITLED TO A JUDGMENT OF ACQUITTAL.

The Government has made no serious attempt to meet the argument of the appellant made under this point in the Opening Brief. Abiding by the rule that the evidence must be considered in the light most favorable to the Government to sustain a conviction, the record in this case is devoid of a showing of the kind of conduct on the part of the appellant which would bring him within the ambit of 18 U.S.C. 1464. The most that the record shows is that in the close of a heated quarrel, both the appellant and the chief witness for the prosecution, Larry Sartain, the defendant, lacking discret resorted to a choice of language universally used to express anger by insulting the object of that anger in terms of sexual derision. Finally, taking the language used in the context in which it was used, there can be no serious contention that it was profane under the applicable standard for profanity.

CONCLUSION

The conviction of the appellant must be reversed by reason of the prejudicial error which visiates his trial. But it is moreover the contention of the appellant that the case should be here dismissed by reason of the constitutional invalidity of 18 U.S.C. 1464 and by reason of the fact that th record shows as a matter of law that the appellant was entitle to an acquittal.

Respectfully submitted,

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CERTIFICATE

I hereby certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

This brief is mailed to the court without proof of service, but service will be made in person on appellee in Las Vegas, Nevada on Monday, April 25, 1966, and proof thereof later forwarded to this court.

Harry E. Claiborne

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ACKNOWLEDGMENT OF SERVICE

RECEIPT OF THREE COPIES of Appellant's Reply Brief n the above entitled appeal is hereby acknowledged this 25th day of April, 1966.

JOHN W. BONNER
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By _____

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